No. 80-1452

IN THE

Supreme Court of the United States

MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

October Term, 1980

SAHARA-TAHOE CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 86, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

I.
Introduction.

Subsequent to the date on which the Petitioner, Sahara-Tahoe Corporation (hereafter "Hotel" or "Petitioner") filed with this Court its Petition for Writ of Certiorari in the above-captioned case (Docket No. 80-1452, filed February 25, 1981), the Court issued its decision in *Texas Department of Community Affairs v. Burdine*, — U.S. —, 49 U.S.L.W. 4214, 25 EPD ¶31,544, 25 FEP 113, No. 79-1764, March 4, 1981. *Burdine* addressed the issues of shifting burdens of proof and the standard of proof to be required of a defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (hereafter "Title VII"). These issues

are virtually identical to the issues presented in the Petition herein.[1]

The Petitioner submits that the rationale of *Burdine* should likewise govern in cases of refusal to bargain under the National Labor Relations Act, as amended, 29 U.S.C. §15 *et seq.* (hereafter "NLRA") arising from an employer's good faith doubt of continued union majority status.

II.

This Court's Analysis in *Burdine* of the Evidentiary Burden Placed Upon the Defendant in a Title VII Lawsuit Applies With Equal Force to Cases Arising Under the NLRA.

The *Burdine* case addressed the specific issue of "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court *by a preponderance of the evidence* that legitimate, non-discriminatory reasons for the challenged employment practice existed." (49 U.S.L.W. 4215) (emphasis supplied). This Court found that the Fifth Circuit Court of Appeals had applied an improper standard of proof

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[1]Neither the Memorandum for the National Labor Relations Board nor the Respondent Union's Brief in Opposition to the Petition address the issues raised by the Petition, but instead attempt to characterize this case as "a quibble regarding the weight of evidence it [the Hotel] presented, and the factual conclusions to be drawn therefrom." (U.Br. 6). Such attempts only highlight the fundamental and important nature of the underlying questions raised by the Petition. Moreover, the opposing briefs further mask the issues by asking this Court to assume that the reasonable good faith doubt standard applied by other circuits in similar cases is equivalent to the "unequivocal evidence" standard applied by the Ninth Circuit. These arguments ignore the plain language of the Ninth Circuit's decision and discount the obvious distinction which the court was making in formulating a standard using language employed by *no* other circuit (nor has the court's language been subsequently adopted by other circuits). Had the Ninth Circuit intended to apply the same standard as these other circuits, it would undoubtedly have used the same language. While the Union and the National Labor Relations Board may choose to ignore or otherwise obscure the important issues raised by the Petition, this Court should not succumb to the same temptation.

to Title VII defendants, in derogation of accepted common law principles and prior Court precedent. In reaching this holding the Court made several crucial observations. At the outset, the Court recognized that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (49 U.S.L.W. 4216). The Court then reiterated and amplified the allocation of burdens and order of presentation first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as follows. The plaintiff has the initial burden to prove by the preponderance of the evidence a prima facie case of discrimination, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." (49 U.S.L.W. 4215).

If the plaintiff can establish the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employment decision in question. *McDonnell Douglas, supra*, 411 U.S. at 802. The Court stressed that it is the burden of production, not the burden of persuasion, which shifts to the defendant: "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (49 U.S.L.W. 4216). The Court further elaborated in footnote 8:

> "This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. 'The word "presumption" properly used refers only to a device for allocating the production burden.' " (citations omitted).

The Court ruled that the Fifth Circuit had demanded far more than the required simple explanation by the employer of what was done, or the production of evidence of legitimate, nondiscriminatory reasons; instead, the Fifth Circuit "would require the defendant to introduce evidence which,

in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production." (49 U.S.L.W. 4217).

Once the defendant has met its burden of production, the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the reasons offered by the defendant were a pretext for discrimination. "This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." (49 U.S.L.W. 4216). The Court emphasized that limiting the defendant's evidentiary burden will not unduly hinder a plaintiff meriting relief from demonstrating intentional discrimination.

The Court's analysis parallels the allocation of burdens which should properly be applied in a refusal to bargain case. The National Labor Relations Board (hereafter "Board") and many circuit courts have recognized that,

> "in order to establish that an employer's withdrawal of recognition and refusal to bargain with an incumbent union transgresses Section 8(a)(5) of the Act, the burden of proof is upon the Board to show that the union actually represented a majority of the employees in an appropriate unit. *Machinists Lodges 1746 & 743 v. NLRB*, 135 U.S.App.D.C. 53, 416 F.2d 809 (1969).
>
> "Failure to prove a majority-status of the Union relieves an employer of the duty to bargain. *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 303 (4th Cir. 1966)." *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, at 331 (6th Cir. 1973), *cited in Automated Business Systems v. NLRB*, 497 F.2d 262, at 270 (6th Cir. 1974).

Likewise, the Second Circuit, in *Textile Workers of America v. NLRB*, 386 F.2d 790 (2d Cir. 1967), found that "The Board acted well within its powers in ruling that the general principle whereby the General Counsel carried the burden as to all elements of an unfair labor practice charge,

. . . applied also to the issue of good faith doubt once the employer has raised it, even though this requires the General Counsel to prove a negative.'' 386 F.2d at 792. That the burden of persuasion remains with the General Counsel despite the application of the rebuttable presumption of continued majority status of an incumbent union is supported not only by case law but also by the Federal Rules of Evidence. Rule 301, Presumptions in General in Civil Actions and Proceedings, states the following:

> ''In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.''[2]

Unlike the Title VII discrimination cases, the General Counsel is not required to establish a prima facie case of violation where an employer has refused to bargain with an incumbent union based on a good faith doubt of that union's majority status, but may instead rely on the presumed majority status of a once-certified union. However, as the Board itself stated in *Stoner Rubber Co.*, 123 NLRB 1440 (1959): ''After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable.'' Thus the presumption acts like the prima facie case to shift the burden of production to the employer. The evidence required of the employer at this stage may establish either (a) actual loss of union ma-

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[2]Section 102.39 of the Board's Rules and Regulations (29 CFR §102.39) provides that, in unfair labor practice proceedings, ''any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . .''

jority,[3] *or* (b) the employer's reasonably grounded good faith doubt supported by objective considerations. *Cf., U.S. Gypsum Co.*, 157 NLRB 652 (1966). The good faith doubt defense is required by the realities of industrial life:

> "Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. *Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status*. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit." *Stoner Rubber Co., supra*, 123 NLRB 1440 (emphasis supplied).

Thus, once the employer has articulated the basis for its good faith doubt, the burden properly shifts back to the General Counsel to prove actual union majority status. The Court in *Automated Business Systems v. NLRB, supra*, agreed with the Board's conclusion in *Stoner Rubber Co., supra*, that such an allocation of burdens did not work an undue hardship on the union: "The General Counsel is in a much better position to prove the majority status of the Union than is the employer." *Automated Business Systems v. NLRB, supra*, 497 F.2d at 271, fn. 8.

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[3]Proof of actual loss of union majority would be a complete defense to a refusal to bargain charge, since it would preclude rebuttal by the General Counsel that, on the refusal-to-bargain date, the union represented a majority of the bargaining unit employees.

In a manner similar to the Fifth Circuit in *Burdine*, the Ninth Circuit in the instant case applied a standard of proof to the Petitioner far in excess of what could properly be required to satisfy the burden of production. By demanding that the Petitioner support its good faith doubt of the union's majority status with "evidence which unequivocally indicates that the union no longer has the majority support of the employees," (Pet. App. 7), the Ninth Circuit has transferred to the Petitioner the burden of persuasion, which should remain with the General Counsel. Just as the defendant in a Title VII lawsuit need only "articulate some legitimate, nondiscriminatory reason" for its action, sufficient to "raise a general issue of fact" (*Burdine, supra*, 49 U.S.L.W. at 4215, 4216), so should Petitioner in the instant case have been required merely to "produce sufficient evidence to cast serious doubt on the union's continued majority status." (*Stoner Rubber Co., supra*). Instead, the Ninth Circuit required Petitioner to persuade the court with evidence to "unequivocally indicate that the union support had declined to a minority." (Pet. App. 6). Thus, the Petitioner was required, in effect, to provide evidence of actual loss of union majority, which would be the only evidence which would "unequivocally indicate" a lack of majority support for the union; such evidence is, as a practical matter, virtually impossible for an employer to obtain. *Stoner Rubber Co., supra; Automated Business Systems v. NLRB, supra*. The Ninth Circuit thereby not only improperly shifted the burden of persuasion to the Petitioner, but also insured that the Petitioner would be unable to sustain the burden placed upon it. Consequently, without introducing one iota of evidence of majority status, the union was permitted to prevail by exclusive reliance on the presumption of continued majority, which has been made irrebuttable by the Ninth Circuit's standard of proof.

This Court in *Burdine* also found that the Fifth Circuit erred by requiring the defendant to prove, in a discrimination

case, that the person hired or promoted was more qualified than the plaintiff. The Court held that such a demand invited potential violation of Title VII by requiring preferential treatment of minorities and females:

> "The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference." 49 U.S.L.W. 4217.

A similar error was committed by the Ninth Circuit in the instant case. The Court misconstrues the statutory duty of an employer to bargain with the majority representative of its employees by requiring an employer who doubts the majority status of an incumbent union to prove actual loss of majority. It is the union, not the employer, who is required to prove representative majority status; the employer who bargains exclusively with a minority union risks violation of section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to contribute support to any labor organization. The Ninth Circuit obligates a preference for incumbent unions, perpetuated by the presumption of continued majority status, which is unwarranted under the Act, and may ultimately mandate violation of the law.

III.
Conclusion.

Just as this Court has recognized the necessity for a clear articulation of the burdens allocable to parties in a Title VII action, so must the Court acknowledge the importance of a similarly clear standard in refusal to bargain cases under the NLRA. The Ninth Circuit has placed a clearly erroneous

burden upon the Petitioner and similarly situated employers. The rectification of this error and an articulation of the proper standard to be applied in such cases merit the immediate attention of this Court.

Dated: May 1, 1981.

Respectfully submitted,

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